STATE OF MICHIGAN

COURT OF APPEALS

RICHARD P. HIRSCHBERGER,

Plaintiff/Counter-Defendant-Appellee,

v

JAMMS HOLDING COMPANY, LLC, d/b/a HERSH INDUSTRIES, INC. and JOSEPH ZANOTTI,

Defendants/Counter-Plaintiffs/Third-Party-Plantiffs-Appellants,

v

RP HERSH and BETTY D. HIRSCHBERGER,

Third-Party-Defendants-Appellees.

UNPUBLISHED
April 19, 2007

No. 267137
Macomb Circuit Court
LC No. 00-003603-CK

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendants appeal as of right the trial court order confirming an arbitration award and entering judgment in favor of plaintiff Richard P. Hirschberger. We affirm.

This case involves plaintiff's sale of his tool and die company to defendant Zanotti, who renamed the business Jamms Holding Company, LLC. Defendant signed a letter of intent to purchase the business, and the parties entered into an asset purchase agreement, an employment/consulting agreement, and a guaranty of payment. Plaintiff agreed to work for defendant to assist in the transition between owners. However, defendant ultimately terminated plaintiff's employment on the ground that plaintiff failed to attain 1997 sales levels in contravention of the parties' agreement.

Plaintiff brought suit against defendant, alleging, inter alia, breach of contract and wrongful discharge. Defendant counterclaimed, alleging, inter alia, breach of contract. The parties ultimately agreed to binding arbitration, and the panel awarded $709,445 in favor of

plaintiff. Defendant appeals as of right the trial court order confirming the arbitration award and judgment.

Defendant argues that the trial court erred in denying his motion in limine to exclude the letter of intent on the ground that it constituted parol evidence. While defendant initially preserved this issue by making a motion in limine, he waived this issue by acquiescing to the admission of the letter of intent during the arbitration proceedings. See *Muci v State Farm Mut Automobile Ins Co*, 267 Mich App 431, 443; 705 NW2d 151 (2005); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Indeed, "'[a] party cannot stipulate a matter and then argue on appeal that the resultant action was error.'" *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 529; 695 NW2d 508 (2004), quoting *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

Defendant next argues that the trial court erred in denying his motion for summary disposition under MCR 2.116(I)(2). We review de novo a trial court's ruling on a motion for summary disposition. *Bd of Trustees of the Policemen and Firemen Retirement Sys of the City of Detroit v Detroit*, 270 Mich App 74, 77; 714 NW2d 658 (2006).

MCR 2.116(I)(2) permits a trial court to enter a judgment for the party opposing a motion for summary disposition if it appears that the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Mithrandir v Dep't of Corrections*, 164 Mich App 143, 145; 416 NW2d 352 (1987). Here, plaintiff moved for partial summary disposition under MCR 2.116(C)(10), asserting that no genuine issues of material fact existed and that he was entitled to judgment as a matter of law as to payment owing under the employment agreement and guaranty of payment. Defendant responded, seeking denial of plaintiff's motion for partial summary disposition and requesting the trial court to grant summary disposition in his favor under MCR 2.116(I)(2).

The trial court denied plaintiff's motion for partial summary disposition. Plaintiff moved for clarification, and the trial court granted the clarification motion. On appeal, defendant contends that the trial court "made no findings pursuant to the MCR 2.116(I)(2) request, and never decided the merits of the request." However, contrary to defendant's assertion, the trial court specifically addressed the issue at the hearing on the clarification motion, and entered an order denying defendant's motion for summary disposition under MCR 2.116(I)(2). Defendant contends that he was entitled to summary disposition where there was no dispute that plaintiff breached the asset purchase agreement, which provided that no adverse changes had occurred to the business since December 31, 1997. Defendant argues that, contrary to plaintiff's representations, the financial condition of the business had been substantially diminished. However, plaintiff refutes this assertion with the arbitration panel's finding that the sales of the company during the first six months of defendant's ownership exceeded the sales of the company during a six-month period in 1996-1997. As evidenced by the arbitration panel's findings, the record reveals that, at the time of the motion, genuine issues of material fact existed concerning the breach of contract claim. Accordingly, neither party was entitled to judgment as a matter of law, and the trial court properly denied plaintiff's motion for partial summary disposition under MCR 2.116(C)(10) and defendant's motion for summary disposition under MCR 2.116(I)(2).

Defendant also argues that the trial court erred in denying his motion to vacate the arbitration award on the ground of arbitrator bias. We review de novo a trial court's decision on

a motion to vacate an arbitration award. *Bayati v Bayati*, 264 Mich App 595, 597-598; 691 NW2d 812 (2004).

MCR 3.602(J)(1)(b) provides that on application of a party, the trial court shall vacate an arbitration award if "there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights." "A party attacking the impartiality of an arbitrator has the burden of proof." *Park v American Casualty Ins Co*, 219 Mich App 62, 71; 555 NW2d 720 (1996). "[T]he partiality or bias that would allow [this Court] to overturn an arbitration award 'must be certain and direct, not remote, uncertain or speculative.'" *Bayati*, *supra* at 601, quoting *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988).

The arbitration award in this case was issued on September 19, 2005, and was filed with the trial court on October 12, 2005. In the meantime, on October 7, 2005, defendant moved to disqualify Judge Kenneth N. Sanborn as an arbitrator. Thereafter, defendant moved to vacate the arbitration award on the basis of arbitrator bias.

To support his argument that Sanborn was biased, defendant proffered an affidavit from defense counsel's attorney attesting that, in a legal malpractice and breach of fiduciary duty case against defense counsel over which Sanborn presided, Sanborn stated that he did not trust defense counsel and that he investigated defense counsel and gathered information supporting this belief. However, the hearing at which the comments were made occurred on September 23, 2005, four days after the arbitration award was issued in this case. Defendant also proffered the transcript of a hearing in which both Sanborn and Macomb Circuit Court Chief Judge Antonio P. Viviano denied defense counsel's motion to recuse Sanborn from hearing the above-referenced case. Defendant also argued that Sanborn violated Canon 5E of the Michigan Code of Judicial Conduct by serving concurrently as a visiting judge on assignment and as an arbitrator. However, the record reveals that Judge Sanborn did not serve as a visiting judge on any of the dates on which the arbitration panel considered the present case.

For this Court to overturn an arbitration award, the partiality or bias must not be remote, uncertain, or speculative. *Bayati*, *supra* at 601. Here, the alleged partiality did not involve defendant, but, rather, defense counsel. Further, the alleged partiality occurred during the course of an unrelated case, after the arbitration award in this case was issued. Moreover, defendant's argument that Judge Sanborn inappropriately served simultaneously as a visiting judge and as an arbitrator was refuted by record evidence. The trial court properly denied defendant's motion to vacate the arbitration award on the basis of arbitrator bias where the alleged instances of partiality and bias were not sufficiently certain or direct to justify overturning the arbitration award.

Finally, defendant argues that the trial court erred in denying his motion to vacate the arbitration award under MCR 3.602(J)(1)(c) on the ground that the arbitrators exceeded their authority by acting beyond the material terms of the arbitration agreement and by acting in contravention of the parol evidence rule. Specifically, defendant argues that where the arbitration agreement provided that all trial court orders control, and where the trial court found that the asset purchase agreement was clear and unambiguous, the arbitrators were estopped from using the letter of intent to determine the parties' intentions. However, as noted above,

defendant waived this issue by acquiescing to admission of the letter of intent during the arbitration proceedings.

Affirmed.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey